IS THE FIFTEENTH AMENDMENT VOID?

NEARLY forty years have elapsed since the Fifteenth Amendment was proclaimed by the Secretary of State to be part of the Constitution of the United States. During that time, it has been hated with a deadly hatred by the section of the country it was designed chiefly to affect. It has been despised, flouted, nullified, evaded. Nevertheless, the Supreme Court of the United States, the lawful guardian of the Constitution, has in no single instance held any state or federal statute or the act of any state or federal officer to be in conflict with the Amendment; and no case in that court can be found which would have been decided differently if the Amendment had never existed.

In a number of cases, it is true, the Supreme Court has decided that the Amendment does *not* do this and does *not* do the other; but if the student of constitutional law, not content with such negative information as to what the Amendment does not do, seeks to ascertain affirmatively what, if anything, it has accomplished, he must find his way by the pure light of reason unaided by the binding authority of any actual decision of our highest court.

Confronted by these remarkable circumstances, the student of constitutional law not unnaturally asks himself: "Can it be that an enactment which has thus borne the slings and arrows of outrageous fortune for nearly forty years and yet during all that time has never affected the result in a single decided case in the court of last resort — can it be that such an enactment is indeed part of the fundamental law of the United States?" To consider one aspect of that question is the object of this article.

The assumptions will be indulged that the Amendment was proposed in a constitutional manner by two thirds of both Houses of Congress and was duly ratified by legislatures in three fourths of the states. Attention will be concentrated upon the question whether, assuming the Amendment to have been proposed and ratified in the manner prescribed for constitutional amendments, it is within the express and implied limitations on the power of three fourths of

the states to amend the Constitution. This involves a preliminary general consideration of the extent of the power of constitutional amendment.

I.

The power of three fourths of the states to amend the Constitution of the United States would seem to be subject to two classes of limitations, — (1) inherent and (2) express.

1. The inherent limitation is that the so-called amendment must be a real amendment, and not the substitution of a new constitution.[1] It may alter many of the vital provisions of the original instrument; but so much of the old constitution must be left that the new provisions may be regarded as merely engrafted on the old stock. A wholly new constitution can be adopted only by the same authority that adopted the present constitution, namely, "the people of the United States," represented by the concurrent action of conventions in all the several states within which the constitution is to be operative.

To draw the line between a mere amendment of the old constitution and an instrument which makes such radical changes as to be fairly regarded only as a new constitution is difficult, not to say impossible. All that can be done is to give a few illustrations that would seem to fall on one side or the other of the line.

Of mere amendments which cannot be deemed to amount to a new constitution, excellent examples are furnished by the first twelve amendments. The Thirteenth Amendment, profoundly as it altered the social system in the slaveholding states, nevertheless falls on the same side of the line. The most important provision of the Fourteenth Amendment — the provision that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws — also falls within the same category. It is a new limitation on the powers of the states, but it does not so radically alter their relations as to amount virtually to a new constitution.

[1] Livermore *v.* Waite, 102 Cal. 113, 118 (*semble*, as to a provision for "amending" a state constitution). The same distinction is illustrated by decisions that an "amendment" to a pleading cannot substitute a new case: Shields *v.* Barrow, 17 How. 130, 144; Goodyear *v.* Bourn, 3 Blatchf. 266; Givens *v.* Wheeler, 6 Colo. 149. So, too, a reserved power to "amend" a charter of incorporation does not extend to the substitution of a new charter: 2 Morawetz, Priv. Corps., 2 ed., § 1096.

On the other hand, one may imagine so-called amendments which would in substance amount to the total abrogation of the old constitution. For instance, the Constitution contemplates a Federal Union, and a Federal Union of all the states; and probably a change which should destroy this fundamental character of the government would not be an "Amendment." Thus, a so-called amendment substituting two or more independent confederacies in the place of the union of all the states would seem not to be within the power of constitutional amendment. Even more clearly, a provision abolishing the several state governments and providing that all the powers of the British Parliament should be lodged in a national congress would be more than a mere amendment.

As already stated, it may often be difficult in the extreme to determine whether a supposed change in the constitution is of such a radical character as to amount to the adoption of a virtually new constitution so as not to be within the power of three fourths of the states on the initiative of two thirds of both Houses of Congress. Some assistance in this perplexity may, however, be afforded by the express limitations upon the power of amendment, which, therefore, it is now pertinent to consider.

Before doing so, it is proper to mention that when the resolution proposing the Fifteenth Amendment was under debate in Congress, the minority argued that it transcended the inherent limitations of the power of constitutional amendment.[1] This contention has recently been revived by the late Judge Morris of the Court of Appeals of the District of Columbia, who draws a distinction between an "amendment" and an "addition" to the Constitution.[2] Probably the learned judge is so far right that an "amendment" must be germane to something in the original instrument; but the difficulty with his contention is that the scope of the Federal Constitution is so broad that it is hard to maintain that any matter pertaining to government is not germane.

In this connection, however, it is observable that the original constitution intermeddled in but two clauses with the internal political affairs of the states,— (1) the guaranty of a republican form of

[1] Congressional Globe, 40th Cong., 3d Sess., 705 *et seq.* (*per* Dixon of Connecticut); 988 (*per* Hendricks of Indiana); 995, 997, 1631 (*per* Davis of Kentucky); 1639 (*per* Buckalew of Pennsylvania); *Id.* Appendix, 151 (*per* Doolittle of Wisconsin); 158–164 (*per* Saulsbury of Delaware); 285 (*per* Davis of Kentucky).

[2] No. Amer. Rev., Jan. 1909, vol. 189, p. 82.

government and (2) the prohibition of a grant of titles of nobility. Even these provisions merely perpetuated the existing political institutions of the state. Every state had a republican government, and no state granted titles of nobility. At most the provisions in question prevented the states from changing their existing governments in certain particulars.[1] Very different is an amendment compelling a state to alter its political institutions. The Fifteenth Amendment is the only example of such an interference with state politics.

2. The power of three fourths of the states to amend the Constitution is subject to the following express restriction:

"Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The clauses which were thus made unamendable prior to the year 1908 are the clause prohibiting the abolition of the slave trade before that year, and the clause requiring direct taxes to be apportioned among the states in proportion to the decennial census.

Now, these express limitations on the power of amendment are very significant. Their implication is far reaching. For instance, the prohibition of an amendment prior to 1808 interfering with the slave trade, euphemistically called the importation of persons, necessarily implied that no constitutional amendment should be adopted prior to 1808 abolishing slavery in the original states.

But the limitations on the power of amendment which expired in the year 1808 are no longer of practical importance. The provision, however, that no state without its consent shall be deprived of its equal suffrage in the Senate, being perpetual, is still in full force, and merits the most careful consideration.

In the first place, this proviso necessarily requires the continuance of the Senate as an integral part of the federal legislature. A state could not be deprived of its equal suffrage in the Senate merely by abolishing the Senate, or reducing it to a body merely advisory, concentrating all legislative power in the House of Representatives.

In the next place, this proviso necessitates the continued existence

[1] The Federalist, in answering an objection to the Constitution based on the alleged dangerous character of the guaranty of republican government, laid stress on this feature. Federalist No. 42.

of the several states. As no state can be deprived, even by constitutional amendment, of its equal suffrage in the Senate, it follows that no state can be deprived of its own existence. In order that a state may enjoy equal suffrage in the Senate, it must continue to exist. Its identity must be preserved.

Moreover, the words "without its consent" necessarily imply that the state shall continue to exist as a body capable of consenting, or in other words as an autonomous political community. That a constitutional amendment may cut down the powers of the state may be conceded; but that it cannot deprive the state of its capacity for self-government within its sphere as thus restricted would seem equally clear. The inherent limitation of the power of amendment would perhaps of itself be sufficient to prevent any such change in the Constitution. For the Constitution in all its features contemplates a federal union of self-governing states; and any abrogation of that feature would seem to be more than a mere amendment. But however this may be, the matter is made quite clear by the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent.

That proviso was, therefore, aptly described in The Federalist as "a palladium to the residuary sovereignty of the states." [1]

The same clause would seem necessarily to imply that the composition of a state cannot be altered without its own consent; for the guaranty of equal suffrage was in favor of the states as they existed in 1789 and as they might subsequently be changed by their own consent or in pursuance of their own laws. If this were not so, the guaranty of equal suffrage in the Senate might be nullified merely by changing the state itself. For example, it will hardly be claimed that three fourths of the states by a constitutional amendment could force a territorial addition upon a small state and thus by enlarging its electorate deprive the residents of the original territorial limits of the state of their exclusive right to elect members of their state legislature and thus indirectly to choose two United States senators. For example, would it be possible for three fourths of the states by a constitutional amendment to provide that the island of Porto Rico, with a population largely in excess of the present State of Rhode Island, should be annexed to that state without its consent, and that the inhabitants of Porto Rico should have the right to vote

[1] The Federalist, No. 43 (8). See also 1 Tucker on the Const. p. 323.

in state elections anything in the constitution or laws of Rhode Island to the contrary notwithstanding? Would not such a constitutional amendment deprive Rhode Island of its suffrage in the Senate? It is true that two senators would continue to sit nominally as senators from Rhode Island, but the Rhode Island which they would represent would not be the Rhode Island known to the Constitution. That Rhode Island would be swallowed up and lost. The name might remain: the substance would be gone.

Hence, it appears that the prohibition of any constitutional amendment depriving any state of its equal suffrage in the Senate implies as a necessary corollary that no constitutional amendment shall alter the composition of a state; and, therefore, it becomes pertinent to inquire what a state is, and how and of whom or of what it is composed. When the Constitution declares that "No State without its consent shall be deprived of its equal suffrage in the Senate," what is meant by "State"? What is a state? In favor of whom, or of what, is this guaranty?

A state may be defined as a political community united under an organized government and exercising sovereignty over a certain territory; the purely geographical sense is derivative and figurative. This has been held by the Supreme Court after full consideration.[1] "The primary conception," said Chief Justice Chase speaking for the court, "is that of a people or community. The people . . . constitute the state. . . . In the Constitution the term state most frequently expresses the combined idea . . . of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."

This principle that the word "state" in the Constitution means primarily the body of citizens invested with political rights has been recognized from the very foundation of the Union. Justice Wilson, who had been a prominent member of the Convention which framed the Constitution, defined a state as "a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own and to do justice to others."[2]

[1] Texas *v.* White, 7 Wall. 700, 720–721.

[2] Chisolm *v.* Georgia, 2 Dall. 419, 455.

Justice Iredell expressed himself a few years later even more emphatically to the same effect:

"A distinction was taken at the bar between a State and the people of the State. It is a distinction I am not capable of comprehending. By a State forming a Republic (speaking of it as a moral person) I do not mean the Legislature of the State, the Executive of the State, or the Judiciary, but all the citizens who compose that State and are, if I may so express myself, integral parts of it; all together forming a body politic." [1]

In these definitions the leading commentators concur.[2]

Sir William Jones has, therefore, defined a state not merely with the fervor of a poet but with the accuracy of a lawyer. What constitutes a state? Not high raised battlement, not mere territory, but men — these constitute a state.

The comparatively few instances in the Constitution in which the word is used in the purely geographical sense to designate the territory over which the state government exercises sovereignty, are easily detected; for we have only to substitute for the word "state," the phrase "area of the state" or "the territory of the state." If the substitution does not alter the meaning, the word is used in the geographical sense; but if on the other hand the substitution makes nonsense of the passage, the word is certainly not used in that sense.

Thus, in the provision that a representative must be an inhabitant of the state in which he shall be chosen, the word is used in its geographical meaning; for without altering the sense, we might read "inhabitant of the area of the state." This is even more clearly true in the clause providing that criminal trials shall take place in the state where the crimes shall have been committed.

Now, in the provision that "no state without its consent shall be deprived of its equal suffrage in the Senate," the word "state" is certainly not used in the geographical sense; for the expression "its consent" shows that the word refers to some person or persons, or to some organization or corporation, capable of consenting. A geographical area cannot consent; and if we should read "no geographical area without its consent shall be deprived of its equal suffrage in the Senate," the clause would become nonsense. There-

[1] Penhallow *v.* Doane's Admr., 3 Dall. 54, 93.

[2] 1 Story on Const. § 208; Cooley, Const. Lims., 7 ed. 1.

fore the word "state" in this place means either the citizens of the state or the government of the state, or else it indicates a blending of the two ideas of people and government. Hence, the clause we are now considering means either that "the citizens or voters of no state without their consent shall be deprived of their equal suffrage in the Senate," or else that "the government of no state without its consent shall be deprived of its equal suffrage in the Senate." In the one aspect, the prohibition would prevent any constitutional amendment enlarging the class of people who constitute the citizenship or electorate of the state, and in the other aspect it would prevent any change in the government or political institutions of the state. If, as is not unlikely, the word "state" in this article of the Constitution refers both to the people of the state and to its government, the prohibition would extend to any change in the class of people who constitute the state, or in their government or political institutions.

A constitutional amendment which should attempt to alter the class of persons who compose the state, and constitute its electorate and repository of political power, would be objectionable on both grounds, even though no change were made in the territorial jurisdiction of the state. It would deprive the state as originally constituted of its suffrage in the Senate. For instance, imagine a constitutional amendment which, without altering the territorial jurisdiction of Rhode Island, should provide that all residents of the city of New York, or of the territory of Porto Rico, or of the Philippine Islands, should have the right to vote in elections for members of the Rhode Island legislature. Such a constitutional amendment would as completely swamp Rhode Island as if foreign territory had been annexed. It would deprive the original citizens of Rhode Island of their exclusive right to elect two senators.

II.

Now let us investigate exactly what changes in the law were attempted to be made by the Fifteenth Amendment, or by the Thirteenth, Fourteenth, and Fifteenth Amendments operating in conjunction. We shall then be in a position to determine whether or not the Fifteenth Amendment exceeds the express or implied limitations of the power of constitutional amendment.

By the common law of all the states, the negroes were slaves — chattels. They were not part of the body politic. They were in no sense citizens.[1] They were "on the same footing with living property of the brute creation."[2] Upon these propositions there has never been any difference of legal opinion, however justly the law which assigned this status of mere property to human beings may have been assailed as barbarous, and however heartily we may rejoice that such a law has ceased to exist.

As more fully explained below, a bitter dispute arose shortly before the Civil War whether even free negroes were, or could be made, citizens and members of the body politic. But those who would answer that question in the affirmative never asserted that slaves were citizens or constituted part of the "people" of the state in which they were held in bondage, or of the United States.

For example, the Supreme Court of Michigan in 1872 in an opinion delivered by Judge Cooley, although dissenting from Chief Justice Taney's doctrine as enunciated in the Dred Scott Case, and although declaring free negroes born in this country to be citizens, nevertheless held that slaves were not citizens and that therefore a child born in Canada of slave parents who had fled or emigrated from Virginia was not made a citizen of the United States by the Act of Congress which provides that children born abroad of citizens of the United States shall be deemed citizens.[3] The child's parents, though born in the United States, were slaves and therefore not citizens within the meaning of the Act of Congress.

Now, it is these negro slaves, these strangers to the social compact, whom the Fifteenth Amendment attempts to invest with the highest political right. Let us disregard for the moment the various stages of the process; for unless the power of constitutional amendment extends to the conversion *per saltum* of slaves into voting citizens, the same result cannot be accomplished more gradually by a series of constitutional amendments.

It will thus be seen that the change is a most serious one in the

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[1] 2 Kent Comm. *258, note; Texas *v.* White, 7 Wall. 700, 721 ("A state, in the ordinary sense of the Constitution, is a political community of *free* citizens"); Scott *v.* Sandford, 19 How. 393, 585–586, 587 (*per* Curtis, J.).

[2] Jarman *v.* Patterson, 7 T. B. Monr. (Ky.) 644, 645–646 (1828); State *v.* Dorsey, 6 Gill (Md.) 388, 390 (1848); People *v.* Compagnie Generale Transatlantique, 107 U. S. 59, 62.

[3] Hedgman *v.* Board of Registration, 26 Mich. 51.

composition of the state and in its scheme of government. It amounts to a forcible annexation to the state of a large number of persons who had never before constituted part of its body politic, who were not its citizens, and who under its laws were no more entitled to political rights than the Zulus of Africa or the Bushmen of Australia. The case is the same in principle as if an extensive and populous foreign territory had been annexed to the state without its consent.

Take as an illustration a state like South Carolina within whose borders the negroes outnumbered the whites.[1] Notwithstanding their numerical majority they were mere property, and enjoyed no political or even civil rights. They were not members of the body politic, and were not parties to the social compact. The white people and they alone constituted the State of South Carolina. Now, could a constitutional amendment without the consent of the government of South Carolina, or of those persons who constituted that state, annex to their body politic the large black majority in their midst and give these blacks — whom South Carolina had never recognized as her citizens — the power to outvote the whites in the election of members of the state legislature and thus indirectly in the choice of two United States senators? Would not such a constitutional amendment deprive the people whom alone the original Constitution of the United States and the laws of South Carolina recognized as constituting that state — would it not deprive them of their "equal suffrage," or indeed of any suffrage at all, in the Senate?

The Fifteenth Amendment amounts to a compulsory annexation to each state that refused to ratify it of a black San Domingo within its borders. It is no less objectionable than the annexation of the San Domingo in the Spanish main.

Before the Amendment, the white people of South Carolina had the right and power to elect two senators of the United States — the same representation in the Senate as the white people of Vermont. After the Amendment, if it is valid, the white people of Vermont, a state which contains virtually no negroes and which therefore is virtually unaffected by the Amendment, continue to be entitled to elect two senators; but the white people of South Carolina have none at all.

[1] The principle is, of course, the same in states where the proportion of negroes to whites is somewhat smaller, as in the border states. South Carolina is taken as a mere illustration; and the fact is not overlooked that under the Reconstruction Acts negroes were voting in South Carolina even prior to the Fifteenth Amendment.

III.

But it will be objected that this argument carries too far, — that the negroes were already converted into citizens, or members of the body politic, by the Thirteenth and Fourteenth Amendments, although not clothed with the elective franchise, and that if it were impossible to alter the composition or membership of the state, those amendments, upon which scores of judicial decisions have turned, would be invalid, and human slavery would still be constitutionally possible in the United States.

To this supposed *reductio ad absurdum* of the argument there are at least three answers.

1. The Thirteenth Amendment merely released the slaves from the dominion of their masters and did not invest them with any rights of citizenship against the will of the states in which they might reside. This may be made manifest by a consideration of the political status of free negroes before the Civil War.

The status of that class of persons was much discussed in the Dred Scott Case.[1] It will be remembered that the question upon a plea in abatement was whether a free negro, descended from slaves, resident in a state, could sue in the federal courts as a citizen of that state. Chief Justice Taney and two of the associates justices,[2] or perhaps three,[3] held that he could not do so, even though the state in question might recognize him as a citizen; no person of African blood descended from slaves, whatever rights and privileges might be conferred upon him by state law, could be deemed a citizen within the meaning of the clause in the federal Constitution conferring jurisdiction over controversies between citizens of different states. Mr. Justice Curtis, dissenting, held that the whole matter depended upon state law; if a free negro should be recognized as a citizen by the law of the state of his birth and residence, he would be deemed by the federal courts a citizen of that state and of the United States, but if on the other hand the state law should not accord him the status of citizen, he would not be deemed a citizen by the federal

[1] Scott *v.* Sandford, 19 How. 393 (1856).

[2] Wayne and Daniel, JJ.

[3] It is not clear from Justice Grier's brief and rather obscure remarks (19 How. 469) whether he agreed with the Chief Justice on this question or had formed no opinion thereon.

courts.[1] Three[2] or perhaps four[3] justices expressed no opinion upon the question. Mr. Justice McLean held (1) that the decision on the plea in abatement, having been in favor of the plaintiff in error, was not open to review in the Supreme Court, but (2) that if it were, the plaintiff though of African descent "being a freeman, and having his domicile in a State different from that of the defendant, he is a citizen within the Act of Congress and the courts of the Union are open to him."[4] If the learned judge meant that a free negro resident in a state was a citizen thereof for purposes of the jurisdiction of the United States courts whether or not recognized by the law of that state as one of its citizens, he stood alone among the members of the court; and few persons would prefer his opinion, unsupported as it was by any reasoning, to the careful and reasoned judgment of Justice Curtis.

We may, therefore, take it as clear that truth lay either with Chief Justice Taney or with Justice Curtis. According to the view of the one, free negroes could not be made citizens within the meaning of the federal constitution by any state or federal law or action; according to the view of the other, they might or might not be citizens according as the state law should provide. In any state which by its legislature or judiciary had distinctly declared that free negroes born or resident within its boundaries should not be deemed citizens, both the Chief Justice and Justice Curtis would have concurred in holding that such free negroes would be citizens neither of the state nor of the United States.

Hence it becomes pertinent to examine the state laws as to the status of free negroes. In at least six states, one of them a Northern state, — Kentucky,[5] Pennsylvania,[6] Tennessee,[7] Arkansas,[8] Mis-

[1] His conclusion was "that it is left to each state to determine what free persons, born within its limits, shall be citizens of such state, and thereby be citizens of the United States." 19 How. 577, 588.

[2] Nelson, Campbell, and Catron, JJ.

[3] As stated above, the position of Grier, J., is not clear.

[4] 19 How. 531–532.

[5] Amy *v.* Smith, 1 Lit. (Ky.) 326 (1822). There were other grounds sufficient to support the decision; but the *dictum* would undoubtedly have been adhered to. See Marshall *v.* Donovan, 73 Ky. 681.

[6] Hobbs *v.* Fogg, 6 Watts (Pa.) 553 (1837), holding that free negroes were not entitled to vote under the Pennsylvania Constitution of 1790 conferring the elective franchise on "every freeman of the age of twenty-one years." The opinion is an able one by Chief Justice Gibson.

[7] State *v.* Claiborne, Meigs (Tenn.) 331 (1838).

[8] Pendleton *v.* State, 6 Ark. 509 (1845).

sissippi,[1] and Georgia,[2] — the courts of last resort even prior to the Dred Scott Case had distinctly announced that free negroes were not citizens. Both Taney and Curtis would have agreed that free negroes resident in those states were not citizens.[3] In North Carolina there had been in 1838 an elaborate *dictum* that free negroes were citizens,[4] but six years later this *dictum* was qualified or retracted.[5] The advocates of the view that free negroes were or might become citizens of a state were able to point to some legislative and administrative precedents; but prior to the Dred Scott Case there was no judicial decision in their favor, and several opposed to them. After the Dred Scott Case, the courts on both sides of Mason and Dixon's Line began to approach the question in a spirit of partisanship. Any Southern courts in which a lawyer might have thought it worth while to raise the question would undoubtedly have followed Chief Justice Taney;[6] and the judges in Northern states were almost equally certain to follow Justice Curtis.[7] This, however, is of little importance; for all agreed that no state could be forced to admit its free negroes to citizenship.

Hence the Thirteenth Amendment merely emancipated the slaves and gave them the status of free negroes.[8] It did not convert them into citizens, against the will of the states in which they might reside. For instance, in Kentucky, which by its Supreme Court had an-

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[1] Leach *v.* Cooley, 6 Sm. & M. (Miss.) 93 (1846).

[2] Cooper *v.* Mayor & Aldermen of Savannah, 4 Ga. 68 (1848); Bryan *v.* Walton, 14 Ga. 185 (1853); Bryan *v.* Walton, 20 Ga. 480 (1856).

[3] See 19 How. 587, where Justice Curtis says, "Not only slaves but free persons of color born in some of the States are not citizens."

[4] State *v.* Manuel, 4 Dev. & Bat. Law (N. C.) 20 (1838).

[5] State *v.* Newsome, 5 Ired. (N. C.) 250 (1844).

[6] See Heirn *v.* Bridault, 37 Miss. 209 (1859); Mitchell *v.* Wells, 37 Miss. 235 (1859); (where the partisanship of the opinion of the court is in painful contrast with the lawyer-like and even-tempered dissenting opinion of Judge Handy, who however fully recognized that free negroes were not citizens); Donovan *v.* Pitcher, 53 Ala. 411 (1875); *Ex parte* Merry, 26 Tex. 23 (1861). The case of Walsh *v.* Lallande, 25 La. Ann. 188 (1873), is *contra*, but was decided by the reconstruction or "carpet-bag" court.

[7] Opinion of the Justices, 44 Me. 505 (1857) (an advisory opinion to the legislature); Opinion of the Judges, 32 Conn. 565 (1865) (noting that in a case decided in 1834, Crandall *v.* State, 10 Conn. 339, the Chief Justice had been of the contrary opinion, but that the court had found the question unnecessary to be decided); Smith *v.* Moody, 26 Ind. 299 (1866) (disregarding *dictum* to the contrary in Thomasson *v.* State, 15 Ind. 449 (1860)); Hedgman *v.* Board of Registration, 26 Mich. 51 (1872).

[8] Civil Rights Cases, 109 U. S. 3.

nounced as early as 1882 that free negroes were not citizens,[1] the freedmen, in the interval between the adoption of the Thirteenth and Fourteenth Amendments were certainly not citizens.[2]

The Thirteenth Amendment, therefore, made no negro a citizen of a state against its will, and consequently is not obnoxious to the objection raised against the Fifteenth Amendment that by altering the membership or composition of the state it deprives the state as originally constituted of its guaranteed representation in the Senate.

2. The Fourteenth Amendment did undoubtedly purport to convert the freedmen into "citizens of the United States and of the State wherein they reside"; and to that extent attempts to alter the membership or composition of the states. If it were admitted that the argument above deduced from the provision that no state without its consent shall be deprived of its equal suffrage in the Senate would, if sound, prevent this change in the citizenship or membership of the body politic, even though the elective franchise was not conferred upon the new members, the only result would be to strike out of the Fourteenth Amendment the seven words "and of the State wherein they reside." There is no conclusive authority that the words quoted are a valid part of the Amendment;[3] and all the important provisions of that Amendment, such as the guaranty of due process of law and of the equal protection of the laws, would remain undisturbed. That an argument leads to the elimination of those seven words can, therefore, hardly be deemed a *reductio ad absurdum.*

3. But it may well be doubted whether the elevation of the negroes to citizenship in the states by the Fourteenth Amendment is more than a matter of sentiment or name, and whether in that light it could be regarded as infringing the guaranty of political autonomy implied in the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent. The Fourteenth

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[1] Amy *v.* Smith, 1 Lit. (Ky.) 326.

[2] Marshall *v.* Donovan, 73 Ky. 681 (1874).

[3] For cases in which the validity of those words in the Amendment has been assumed, although in none of them was it necessary to the decision, see Slaughter House Cases, 16 Wall. 36, 72–73; Bradwell *v.* State, 16 Wall. 130, 138; Minor *v.* Happersett, 21 Wall. 162, 165; Boyd *v.* Nebraska, *ex rel.* Thayer, 143 U. S. 135, 158, 160, 161; Van Valkenburg *v.* Brown, 43 Cal. 43; Elk *v.* Wilkins, 112 U. S. 94, 101. See also Clausen *v.* Am. Ice Co., 144 Fed. 723.

Amendment gives negroes the right to sue and be sued in the federal courts as citizens of the state of their residence; but to confer that privilege is certainly within the scope of a constitutional amendment. It also protects them in other states from discrimination in respect to the fundamental rights of person and property, under the provision that citizens of each state shall be entitled to the privileges and immunities of citizens in the several states; but that too is within the scope of a constitutional amendment. It does little, if anything, more of practical importance. It is at most a grant of the civil rights pertaining to citizenship in a state.

Certainly the citizenship attempted to be conferred by the Fourteenth Amendment does not imply the enjoyment of any political rights or share in the government. The case of women is the most familiar example of the truth of this proposition. The state is entitled to withhold the suffrage from such of its citizens as it chooses and (unless the Fifteenth Amendment may restrict the power) on such grounds as it chooses. The objection to the Fifteenth Amendment is not merely that it alters the technical citizenship or membership of the state, but also that it alters its political institutions and destroys its political autonomy.

In view of these facts, it may be doubted whether the argument advanced above necessarily goes to the extent of invalidating the provision in the Fourteenth Amendment that all persons born or naturalized within the United States and subject to the jurisdiction thereof are citizens of the state wherein they reside; but if the argument does necessarily carry to that length, there is no reason to shrink from that conclusion. Certainly, that fact, if it be a fact, is no reason for denying the soundness of the argument.

4. The guaranty of equal protection of the laws contained in the Fourteenth Amendment prevents class legislation, or discrimination on account of race or color or any similar ground, but only in respect to civil rights. It has no reference to political rights such as the right to vote. Otherwise, the Fourteenth Amendment would have conferred suffrage upon the negroes, if any constitutional amendment could do so; and there would have been no occasion for the Fifteenth Amendment. Moreover, the second section of the Fourteenth Amendment, by the provision for reduction of representation in Congress, clearly recognized that, notwithstanding all the provisions of the first section, the states were intended to remain at

liberty to deny the suffrage to negroes.[1] Hence that clause of the Fourteenth Amendment need not be further considered.

IV.

Some critics may object, however, that the power vested in Congress "To establish an uniform rule of naturalization" has some bearing upon the alleged power to add the freedmen and their descendants to the body politic of a state against its consent.

1. This cannot be admitted. The power of naturalization extends only to aliens — persons who are subject to the jurisdiction of some foreign state. A person born within the jurisdiction of the United States can never be brought within the power of naturalization. For instance, in the Dred Scott Case, judges who differed so widely as Chief Justice Taney and Justice Curtis were agreed that free negroes could not be made citizens by any process of naturalization.[2] All the other authorities are to the same effect.[3]

2. The argument that the delegation to the federal government of the power to naturalize aliens shows that the power to introduce new members into the body politic cannot be so serious a change in the composition of the state as the argument above set out would indicate, and cannot be taken impliedly to be forbidden by the prohibition of any constitutional amendment depriving a state without its consent of its equal suffrage in the Senate, involves a complete *non sequitur*. Because the states may have yielded up a limited power to introduce new members into their bodies politic, does it follow that a very different and much more dangerous power can be wrested from them? Because a state may have consented to receive into its bosom the foreigners who may immigrate to its shores and whom Congress may see fit to naturalize, does it follow that its membership may further be diluted, and even overwhelmed, by the addition of a mass of members of an inferior race resident in its borders but not admitted by its laws to citizenship?

But the power of naturalization does not enable Congress to con-

[1] McPherson *v.* Blacker, 146 U. S. 1, 38–39; Minor *v.* Happersett, 21 Wall. 162; Van Valkenburg *v.* Brown, 43 Cal. 43.

[2] Scott *v.* Sandford, 19 How. 393, 417 (*per* Taney, C. J.), 578 (*per* Curtis, J.).

[3] *E. g.*, U. S. *v.* Rhodes, 1 Abb. (U. S.) 28, 45 (*per* Swayne, J.); City of Minneapolis *v.* Reum, 56 Fed. 576, 577 (*per* Sanborn, Circ. J.).

fer the suffrage on naturalized foreigners.[1] At most, naturalization confers a technical citizenship on the foreigner; and the states are still at liberty to withhold from him any or all political rights. As stated above, such citizenship is largely a matter of name and sentiment. Naturalization, therefore, does not have the same, or a similar, perturbing effect as the Fifteenth Amendment upon the political composition and government of the state.

Moreover, it may be questioned whether the power of naturalization extends any further than the admission of aliens to citizenship in the United States as distinguished from citizenship in the state.[2] For conversely, though the federal power of naturalization is exclusive, a state may admit an unnaturalized alien to membership in its own body politic, endow him with the suffrage and with full political rights, investing him with local or state citizenship,[3] although the state is without power to make him a citizen of the United States,[4] and although notwithstanding his state citizenship he remains entitled to sue or be sued in the federal courts as an alien.[5]

V.

It may also be objected that even apart from the War Amendments, the provision that citizens of each state shall be entitled to the privileges and immunities of citizens in the several states would enable one state, by admitting negroes to citizenship and political privileges, to entitle them to like rights in other states. If this were so, it would furnish no ground for inferring a power to annex to a state by constitutional amendment those negroes within its own borders who have never been citizens of another state. But the constitutional provision in question refers only to fundamental civil privileges and immunities, and does not confer any such political privilege as the elective franchise.[6] Moreover, the instant a citizen

[1] Pope *v.* Williams, 193 U. S. 621, 633.

[2] If this were not so, the word "naturalized" in the first section of the Fourteenth Amendment would be surplusage. But see Gassies *v.* Ballon, 6 Pet. 761 (1832).

[3] *Re* Uhlitz, 16 Wis. 443.

[4] State *v.* Cole, 17 Wis. 674.

[5] City of Minneapolis *v.* Reum, 56 Fed. 576; Lanz *v.* Randall, 4 Dill. 425. *Cf.* Scott *v.* Sandford, 19 How. 393, 405, 406.

[6] Campbell *v.* Morris, 3 H. & McH. 535, 554. See also 1 Mich. L. Rev. 286, 292–293 (article by W. J. Myers). *Cf.* Pope *v.* Williams, 193 U. S. 621. Unless in the Dred

of one state becomes a citizen of another state (as he must do in order to vote in that state), he ceases to have in that state any benefit from the constitutional guaranty.[1]

VI.

It may also be urged that by means of the power to admit new states, Congress may evade the guaranty to each state of equal suffrage in the Senate, and that this possibility of evading the provision in one way shows that there can be no objection to evading it in another way, — namely, by altering the composition or membership of the state and thus injecting into its electorate a controlling hostile element. This argument, like those answered in the last two divisions of this article, amounts to a *non sequitur*. Because one method of circumventing the guaranty of equal suffrage in the Senate may be constitutionally possible, it does not follow that another and wholly different method of accomplishing the same or a similar result is permissible.

But as a matter of fact the power to admit new states cannot be used to accomplish anything like the revolutionary results of the Fifteenth Amendment. It is true that Congress might divide New York into forty states, each having a population approximately equal to that of Delaware; and in this way the component parts of the original State of New York would acquire a vote in the Senate largely preponderating over that of Delaware. But the assent of New York would be necessary to any such arrangement, and Delaware may safely repose in the assurance that New York would never consent to its own dismemberment. Moreover, even if such a process of subdividing the larger states were ever consummated, the small states such as Delaware would retain their own existence and would stand on an equality with all the other states. Because it is possible to subdivide the large states with their consent into states of the size of the smallest state, does it follow that an amendment may take from the citizens of a state control of its own govern-

Scott Case, Taney was wrong and Curtis right, free negroes could not claim the benefit of this clause of the Constitution at all, even in respect to civil as distinguished from political rights.

[1] Scott *v.* Sandford, 19 How. 393, 422 (*per* Taney, C. J.); Bradwell *v.* State, 16 Wall. 130, 138.

ment, transferring control to a mass of persons who are external to its electorate and citizenship, thus depriving the original citizens and members of the state of all effective representation in their own state government and in the Senate of the United States?

Indeed, the power of a majority of the states to admit new states in sufficient numbers to pass a constitutional amendment furnishes a strong reason for giving full effect, in spirit and in letter, to the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent — the only effective "palladium to the residuary sovereignty of the states" against a tyrannical and determined majority.

VII.

Perhaps the strongest obstacle to be overcome by the argument advanced in this article is a vague but obstinate idea that the guaranty of equal suffrage means no more than that two senators must continue to sit nominally on behalf of each state.

A moment's reflection will demonstrate that this idea is unsound. Suppose a constitutional amendment should provide that the two senators from Massachusetts should be elected by the legislature of New York, or that the legislature of Massachusetts should be elected by citizens of New York, would anybody deny that Massachusetts would be deprived of its equal suffrage, and indeed of any suffrage at all, in the Senate? There would continue to be in name two senators from Massachusetts, but in name only.

So it is under the Fifteenth Amendment. When that Amendment went into effect in such a state as South Carolina [1] and provided that the two senators from South Carolina should not be elected by a legislature of that state chosen by its citizens, namely, the white people resident within its boundaries, but by an electorate in which those citizens of South Carolina constituted a mere minority, there ceased to be, in anything but name, two senators from South Carolina. The South Carolina by whom the senators were thenceforth chosen and whom they represented was not the South Carolina of the Constitution. It was in substance a new state in which the citizens of the true South Carolina were a helpless minority.

[1] See *supra*, p. 178, note 1.

Suppose a constitutional amendment should confine the suffrage to Roman Catholics. Would not such an amendment deprive the descendants of the Pilgrim Fathers of their representation in the Senate? Would it not deprive the State of New Hampshire, with a citizenship which is still ninety per cent Protestant, and which at the adoption of the Constitution was almost if not quite exclusively of that faith, of its suffrage in the Senate? Yet, such a constitutional amendment would be unobjectionable if the Fifteenth Amendment is valid.

But it may be said that the white people of the South have been able, notwithstanding the Fifteenth Amendment, to regain control of their state governments, and that therefore the effect of that amendment cannot be so revolutionary as the trend of this article would assume. Without conceding the soundness of this argument even were its premises admitted, we may point out that if the Fifteenth Amendment be valid, the means by which the white people of the South regained control of their states, however justifiable morally, must have been illegal. Having once succeeded by illegal means in securing control of their states, they may perhaps by disfranchising laws based on some pretext other than race or color succeed in retaining power without further violation of law; but the restoration of political power to the white people of the South can only have had its origin in illegality, unless the Fifteenth Amendment is void.

VIII.

The Constitution does not altogether prohibit amendments depriving a state of its equal suffrage in the Senate, but only prohibits such deprivation without the consent of the state. For instance, Delaware would have no right to complain of an amendment depriving Maryland of her suffrage in the Senate. It might be urged, therefore, that the Fifteenth Amendment should at all events be held operative in those states which assented to it, or were counted as assenting to it. According to this view, the Amendment would be operative in all the far southern states, and in fact throughout the Union except in Delaware, Maryland, Kentucky, Tennessee, California, and Oregon — the six states which are acknowledged never to have ratified the amendment. But the Fifteenth Amendment evidently contemplates a uniform rule throughout the whole

country. Therefore, it will hardly be disputed that if for any reason the amendment cannot be constitutionally enforced in one of the states, then it is void and inoperative in all of them.

Of the six states above enumerated as refusing to concur in the Fifteenth Amendment, three — Delaware, Maryland, and Kentucky — also rejected the Fourteenth Amendment; and two of those three — Delaware and Kentucky — refused to consent to the Thirteenth. There are, therefore, two states which never consented to any of the three War Amendments; and in those states at least the entire process of converting slaves into voters was dissented from and opposed at every stage by the legal government of the state.

IX.

A final objection is that it is now too late to question the validity of the Fifteenth Amendment. Many answers may be given to this objection.

In the first place, as was mentioned at the very outset of this article, not only has the question never been expressly raised in the Supreme Court of the United States, but there is no decision of that tribunal in which a different result would have been reached if the Fifteenth Amendment had never been conceived. If that amendment is proved to be invalid, there is not a single decision of the Supreme Court which would have to be on that account acknowledged to have been wrongly decided. Consequently, the doctrine of *stare decisis* furnishes no obstacle to holding that the Fifteenth Amendment is invalid.

In several cases, the Supreme Court has proceeded on the assumption of the validity of the Fifteenth Amendment and has considered its construction; but in all these cases the conclusion ultimately reached was that the amendment according to its true construction did not sustain the contention of the party relying thereon.[1] Such cases cannot as authority for the validity of the amendment amount to more than *obiter dicta*. In none of them were the questions raised

[1] U. S. *v.* Reese, 92 U. S. 214 (1875); U. S. *v.* Cruikshank, 92 U. S. 543, 555–556 (1875); Neal *v.* Delaware, 103 U. S. 370, 385–393 (1880); U. S. *v.* Harris, 106 U. S. 629, 637 (1882); *Ex parte* Yarborough, 110 U. S. 651, 664-665 (1884); James *v.* Bowman, 190 U. S. 127 (1902). More casual references to the Amendment are found in Slaughter House Cases, 16 Wall. 36, 71 (1873); Minor *v.* Happersett, 21 Wall. 162, 175 (1874); McPherson *v.* Blacker, 146 U. S. 1, 37, 38 (1892); Giles *v.* Teasley, 193 U. S. 146 (1904); Pope *v.* Williams, 193 U. S. 621, 632 (1904); Elk *v.* Wilkins, 112 U. S. 94, 109 (1884).

by this article suggested in argument or in any way brought to the attention of the court.

Moreover, there seems to be no reported decision of a state court of last resort which necessarily involves the validity of the Fifteenth Amendment.[1] If the amendment is invalid, a few reported cases in lower federal courts must be admitted to have been wrongly decided;[2] but most of them have been since overruled, and in none of them were the points here raised in any way suggested by counsel or considered by the court. Such cases are, certainly, of little weight as authority.

Mere lapse of time is no bar against attacking the validity of the amendment. If twenty years must elapse in order to toll a private right of entry, how long a period is necessary to bar the most sacred constitutional rights of sovereign states? When, in 1856, the validity of the Act of Congress of 1820 known as the Missouri Compromise was challenged, no judge contended that the thirty-six years which had elapsed since its passage and in which its provisions had been cheerfully acquiesced in by the whole country, should prevent the court from examining and deciding the question on its merits. The utmost weight of any such lapse of time was expressed by Justice Curtis with characteristic accuracy:[3]

"A practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind, on a question of the interpretation of the Constitution."

Now, such measure of recognition and acquiescence as the Fifteenth Amendment has commanded was not "nearly contempora-

[1] The nearest approach is Wood *v.* Fitzgerald, 3 Ore. 568 (1870), where in a contested election case the court declared that the votes of two negroes who were disqualified by the state constitution ought to be counted. But if the votes of the negroes had been rejected, the result of the election would not have been affected, as one of the two candidates for whom they both voted was held to be defeated notwithstanding their votes were counted in his favor, whereas the other would have had, according to the court's count, a majority even without their two votes.

[2] Kellogg *v.* Warmouth, Fed. Cas. No. 7,667 (1872) (overruled by U. S. *v.* Reese, 92 U. S. 214); U. S. *v.* Crosby, 1 Hughes 448 (1871) (overruled by Karem *v.* U. S., 121 Fed. 250, and Lackey *v.* U. S., 107 Fed. 114); U. S. *v.* Given, Fed. Cas. No. 15,210 (1873). So far as the writer's researches go, the case last cited is the only reported case, standing unreversed and not overruled, which necessarily involves the existence of the Fifteenth Amendment.

[3] Scott *v.* Sandford, 19 How. 616.

neous with the adoption of the Constitution," but originated nearly a hundred years after that time. Consequently, it cannot fairly be taken as of much weight with respect to the meaning of that instrument or of the proviso that no constitutional amendment shall deprive any state of its equal suffrage in the Senate without its own consent.

Moreover, the Fifteenth Amendment has never been acquiesced in unreservedly throughout the country. Indeed, it has never been loyally observed except in places where its effect was small. In large portions of the country it has been persistently evaded and overridden, now by force and now in other ways.

Finally, the argument based upon the construction of the Constitution by the legislative and executive departments is never controlling upon the courts. At least in respect to constitutional questions, it is not true that *communis error facit jus*, but at most *communis opinio* is evidence of what the law is.[1] The courts should never permit themselves to be influenced by such considerations unless, apart therefrom, the judicial mind is left in a state of doubt and indecision.

In the case now under consideration, the opinion of the legislative and executive departments at the time of the adoption of the Amendment is entitled to unusually little weight. It was a time of great excitement consequent upon a civil war and the assassination of the chief executive. Hearts beat hard and brains high-blooded ticked. The opponents of the measure were cowed and stupefied. The hour was not conducive to correct legal judgments — least of all, on the part of men active in politics.

X.

The constitutional arguments of the minority in Congress in opposition to the passage of the Fifteenth Amendment were based upon the inherent limitations of the power of amendment;[2] and attention was not directed to the proviso guaranteeing to each state its equal suffrage in the Senate. Nevertheless several senators forcibly pointed out the necessary results of holding the Fifteenth Amendment to be within the power of amending the Constitution. For instance, Senator Saulsbury of Delaware said:

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[1] Isherwood *v.* Oldknow, 3 M. & S. 396.

[2] See *supra*, p. 171.

"If two thirds of Congress were to propose an amendment, and three fourths of the States were to ratify it, to blot out the State of Rhode Island and the State of Delaware, two of the smallest States in the Union, could you legitimately do so? Would it be a legitimate exercise of the power of amendment to destroy the members composing the Federal Union, to destroy the parties to the Federal Union? I presume that it will not be contended as possible.

"What is the difference when two thirds of the States propose and three fourths of the States ratify what they call an amendment which deprives the States of Delaware and Rhode Island of the exercise of authority within their own limits? . . .

"It is a perfectly legitimate mode of testing the soundness of a principle by carrying it out to its logical conclusions. If you have the authority to say who shall vote in a State, you have the authority to say who shall not vote in a State. If you have the authority to say who shall not vote in a State, you have the authority to say that no one shall vote in a State. . . . If you have that authority, you have the authority to say what shall be the law of that State; how that law shall be enacted; by whom the functions of government shall be exercised. If you can do that, you can go to the hub of the universe, this modern Athens, from whence comes all this modern illumination, and send some one of the wise men from the East to my State to do all the voting and hold all the offices." Congressional Globe, 40th Congress, 3rd Session, Appendix, p. 162.

If it be said that this is the argument from abuse of power — an argument which is generally recognized as dangerous — one may reply that the hypothetical cases put by Senator Saulsbury scarcely go beyond the actual results of the Fifteenth Amendment. What could be a stronger exercise of alleged power than to take a state government out of the hands of its citizens and give it over to a mass of persons who by its laws were mere chattels, were not its citizens, and did not form members of its body politic?

XI.

The objections to the validity of the Fifteenth Amendment raised by this article might be obviated if its application within the states could be confined by construction to federal elections for members of the House of Representatives.[1]

[1] Another construction, which would, if not obviate, at least render less formidable, the objections to the validity of the Amendment, would confine its operation to persons who have once acquired the right to vote under the state laws. This construction was

The words "privileges and immunities of citizens of the United States" in the Fourteenth Amendment have been held to mean such privileges and immunities as are enjoyed by virtue of citizenship in the United States and not to include privileges and immunities enjoyed by citizens of the United States as citizens of some particular state.[1] By parity of reasoning, should not the words the "right of citizens of the United States to vote" in the Fifteenth Amendment be held to include only any right to vote which may be enjoyed by citizens of the United States as such? It will be objected that this construction would deprive the words of all meaning, because citizens of the United States as such have no right to vote, that right being founded on state laws. The force of this objection must be admitted; but it may be pointed out that the right to vote for members of the House of Representatives does arise from the Constitution of the United States,[2] and perhaps may therefore more appropriately be designated as a "right of citizens of the United States" than the right to vote at state and municipal elections.

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advanced by counsel in Anthony *v.* Halderman, 7 Kan. 50, and has been very forcibly advocated by Judge Albion W. Tourgee in an article in The Forum, March, 1890, vol. 9, pp. 78–92. The objection to it is not so much the *dicta* to the contrary in *Ex parte* Yarborough, 110 U. S. 651, 664–665, and Neal *v.* Delaware, 103 U. S. 370, 389, as the contemporaneous practical construction of the Amendment as well by its opponents as by its friends.

[1] Slaughter House Cases, 16 Wall. 36.

[2] Swafford *v.* Templeton, 185 U. S. 487; Wiley *v.* Sinkler, 179 U. S. 58. It has, however, been held that the right to vote for presidential electors is not a privilege or immunity of citizens of the United States within the Fourteenth Amendment: McPherson *v.* Blacker, 146 U. S. 1, 37–39.